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# **Copyright, Creativity and Cultural Property Rights: The Case of Arts Festivals**

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## **CULTIVATE WORKING PAPER 1**

### **INTRODUCTION**

- In general terms this paper is located in the context of persistent claims to connect copyright with creativity and so-called “cultural rights”/human rights of various types. For this reason I want to start my presentation with some reflections on the relationship between copyright and cultural rights and then move on the specific case of festivals. After which I hope to be able to raise some questions about the relationship between copyright, creativity and cultural rights.
- I should emphasize that my aim at the moment is to raise questions rather than draw conclusions. And the questions that I raise will inform the empirical study of various arts festivals, which I will be undertaking.

### **CULTURAL RIGHTS, HUMAN RIGHTS, INTELLECTUAL PROPERTY RIGHTS**

- In order to investigate the connection between human rights, rights to culture and intellectual property rights, I want to start by giving some flesh to the idea of cultural rights.

## **1. Is there a “right to culture”?**

### **International legal instruments**

- There are a number of UNESCO Conventions that bear directly on the question of “cultural rights”.
- So we have, for example: 1. the Convention on the Prevention of the Illicit Movement of Cultural Property of 1970; 2. the World Heritage Convention of 1972; 3. the Convention on the Protection of Underwater Cultural Heritage of 2001; 4. the Convention for the Safeguarding of Intangible Cultural Heritage of 2003, which entered into force on 20 April 2006; and 5. the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which entered into force on 18 March 2007.<sup>1</sup>
- Of course, it seems highly irregular to have mentioned the first three of these Conventions in the present context. This is, perhaps, because the persistent connection between some types of cultural rights and intellectual property rights has tended to suggest that what might be described as “tangible culture” is an entirely different order of things to more intangible forms.
- At least in the area of cultural heritage, this separation between the tangible and the intangible is problematic precisely because the thing that makes a tangible item a part of cultural heritage is its symbolic or intangible association.
- For this and for other reasons, I think it is worth raising some questions about this tangible/intangible distinction when one is considering the relationship between cultural rights/property and intellectual property – and I’ll come back to this shortly. Nevertheless, as a copyright scholar, I confess to being in thrall to the tangible/intangible distinction with the result that I am going to say more about the Convention on Intangible Cultural Heritage and the Convention on Cultural Diversity.

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<sup>1</sup> There is also the Convention on the Protection of Underwater Cultural Heritage, which entered into force on 2 November 2001, but this Convention is not considered in this paper.

- However, in the context of an examination of where human rights start and end in this disputed territory and what their significance to it might be, I want, first, to say a little bit about the international legal background of these two UNESCO Conventions by talking a little bit about what the human rights conventions do in this area.
- The human rights conventions with which I am particularly concerned are the Covenants to the UN Charter.
- The provisions of these Covenants that may be argued to operate together in order to create a right to culture are Articles 1, 19, 27 of the Covenant on Civil and Political Rights (CCPR) and Art 15 of the Covenant on Economic Social and Cultural Rights (CESCR). I'm not going to bore you, or myself, with a close textual analysis of these provisions. Rather, I will confine myself to the following observations on them:
  - When these provisions are analysed it can be seen that it is probably more appropriate to characterize their composite effect as creating, if anything, a right to cultural self-determination, which in turn suggests the valorization of cultural diversity.
  - As is not infrequently the case with provisions of this sort in international instruments, the exact ambit of the provisions in CCPR and CESCR are far from clear. One example of this is the right in Article 15.1(a) "[t]o take part in cultural life", which is obviously of some significance in the context of a right to cultural self-determination.
  - Article 27 of CCPR and Article 15.1(c) of CESCR have attracted particular debate. This is because it is frequently argued that these provisions support the characterisation of intellectual property rights as human rights. Article 27 of CCPR is said to ground the grant of intellectual property rights to protect traditional and Indigenous cultural expressions and knowledge. Article 15.1(c) of CESCR is said to ground intellectual property rights, in general, on a human rights basis. A similar argument is frequently made with respect to the precursor of Article 15.1(c), Article 27.2 of the Universal Declaration of Human Rights (UDHR). This is not surprising since CESCR, Article

15.1, is clearly based upon Article 27 of the UDHR. It is evident that none of Article 27.2 of the UDHR, Article 15.1(c) of CESCR or Article 27 of CCPR necessarily mandate intellectual property protection in the form in which it currently prevails. It is also clear that whatever means are chosen to implement the rights contained in these Articles, those rights must be balanced against the other rights laid down in Articles 27 of the UDHR, Article 15 of the CESCR, and in the Covenants as a whole.

- These somewhat diffuse and loose-fitting provisions of the UDHR, the CCPR and CESCR form the backdrop to the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.
- It is evident from the Preambles and operative provisions of both Conventions that they firmly lodge themselves within the human rights camp, even if neither goes so far as to create a new human right.
- This is particularly true in relation to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which pushes the human rights envelope considerably further, and more floridly, than its older sibling,<sup>2</sup> which is perhaps a consequence of the current obsession with the language of human rights.

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<sup>2</sup> For an assessment of the relationship between the UNESCO Convention and existing international human rights obligations, see C Graber, "The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?" (2006) 9 *Journal of International Economic Law* 553, 560-563.

## **Relationship between the UNESCO Conventions, intellectual property rights, and the World Trade Organization Agreements**

- Neither UNESCO Convention has much to say about intellectual property rights. Both have only a passing reference to it.
- Neither suggests that these rights are critical to realizing their objectives, and only the Convention for the Safeguarding of Intangible Cultural Heritage appears to give any recognition to the potential of intellectual property rights to interfere with those objectives.
- The absence of much in the way of references to intellectual property rights as a mode for the realization of Convention objectives is, at least, notable in relation to the Convention for the Safeguarding of Intangible Cultural Heritage. On the other hand, it seems particularly odd that the Convention on the Protection and Promotion of the Diversity of Cultural Expressions is so little concerned with the negative effects of intellectual property rights.<sup>3</sup>
- In fact, on the contrary, and from my point of view rather alarmingly, in April this year UNESCO “celebrated” the importance of copyright in preserving creativity on the “World Book and Copyright Day”, the day on which in 1616 Cervantes, Shakespeare and Inca Garcilaso de la Vega all

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<sup>3</sup> Although it would be unwise to ignore the potential negative effects of intellectual property rights on the protection of intangible cultural heritage: see, eg, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS/290/R, 15/3/2005; see also M Blakeney, “Biotechnology, TRIPs and the Convention on Biological Diversity” (1998/1999) 4 *Bioscience Law Review* 144-50; M Blakeney, “Protection of Plant Varieties & Farmers’ Rights” [2002] 24 *European Intellectual Property Review* 9; G E Evans & M Blakeney, “The Protection of Geographical Indications after Doha: Quo Vadis?” (2006) 9 *Journal of International Economic Law* 575, 582-586.

died. (Having previously all been impressively creative without the benefit of copyright.) Anyway, on World Book Day UNESCO highlighted “the importance of the fight against piracy to preserve creativity”.

- This would not matter in the least, but for the fact that the operation of the international copyright system has the capacity to have a negative impact on cultural diversity.
- The threat that the international copyright system poses to cultural diversity and self-determination is a consequence of the process by which it commodifies and instrumentalises the cultural outputs with which it is concerned.<sup>4</sup>
- Viewed in isolation from the market conditions that characterise the cultural industries, copyright’s commodification of cultural output might appear, not only benign, but justified by both the need for creators to be remunerated in order to encourage them to create<sup>5</sup> and, in particular, the need for cultural works to be disseminated in order to reap the social

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<sup>4</sup> For an account of the overlaps between the concepts of culture with which the UNESCO Convention is concerned, and the subject matter of copyright law, see F Macmillan, “Copyright, the World Trade Organization, and Cultural Self-Determination”, in F Macmillan (ed), *New Directions in Copyright: Vol 6* (Cheltenham: Edward Elgar, 2007) 304.

<sup>5</sup> See, however, R Towse, *Creativity, Incentive and Reward: An Economic Analysis of Copyright and Culture in the Information Age* (Cheltenham: Edward Elgar, 2001), esp chs.6 & 8, in which it is argued that copyright generates little income for most creative artists. Nevertheless, Towse suggests that copyright is valuable to creative artists for reasons of status and control of their work.

benefits of their creation.<sup>6</sup> However, viewed in context the picture is somewhat different.

- This is because copyright law has contributed to, augmented, or created a range of market features that have resulted in a high degree of global concentration in the ownership of valuable intellectual property in cultural goods and services.
- So far as cultural diversity and self-determination are concerned, the consequences of this copyright facilitated aggregation of private power over cultural goods and services on the global level are not happy ones:
  - Through their control of markets for cultural products the multimedia corporations have acquired the power to act as a cultural filter, controlling to some extent what we can see, hear and read.<sup>7</sup>
  - Closely associated with this is the tendency towards homogeneity in the character of available cultural products and services.<sup>8</sup> [This tendency, and the commercial context in which it occurs, has been well summed up by the comment that a large proportion of the recorded music offered for retail sale has “about as much cultural diversity as a

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<sup>6</sup> For arguments about the importance of copyright in securing communication of works, see N W Netanel, “Copyright and a Democratic Civil Society” (1996) 106 *Yale Law Journal* 283; & W van Caenegem, “Copyright, Communication & New Technologies” (1995) 23 *Federal Law Review* 322.

<sup>7</sup> See further: F Macmillan, “Public Interest and the Public Domain in an Era of Corporate Dominance”, in B Andersen (ed), *Intellectual Property Rights: Innovation, Governance and the Institutional Environment* (Cheltenham: Edward Elgar, 2006) 46; and, in relation to the film industry, see F Macmillan, , “The Cruel ©: Copyright and Film” [2002] *European Intellectual Property Review* 483, 488-489. See also: A Capling, “Gimme shelter!”, *Arena Magazine*, (February/March, 1996) 21; R L Abel, *Speech and Respect* (London: Stevens and Son/Sweet and Maxwell, 1994), 52; R L Abel, “Public Freedom, Private Constraint” (1994) 21 *Journal of Law and Society* 374, esp 380.

<sup>8</sup> See also R Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder: Westview Press, 1996).



Macdonald's menu".<sup>9</sup> It makes good commercial sense in a globalized world to train taste along certain reliable routes, and the market for cultural goods and services is no different in this respect to any other.<sup>10</sup> Of course, there is a vast market for cultural goods and services and, as a consequence, the volume of production is immense. However, it would obviously be a serious mistake to confuse volume with diversity.]

- The vast corporate control over cultural goods and services also has a constricting effect on what has been described as the intellectual commons or the intellectual public domain.<sup>11</sup> The impact on the intellectual commons manifests itself in various ways.<sup>12</sup>
- For example, private control over a wide range of cultural goods and services has an adverse impact on freedom of speech.
- The ability to control speech, arguably objectionable in its own right,<sup>13</sup> facilitates a form of cultural domination by private interests. This may, for

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<sup>9</sup> Capling, n 7 *supra*, 22.

<sup>10</sup> See T Levitt, "The Globalisation of Markets" (1983) 61 *Harvard Business Review* 92. Cf J Gray, *False Dawn: The Delusions of Global Capitalism* (New York, New Press, 1998), 57-58. However, Gray's view seems to be that diversity stimulates globalization, which must be distinguished from the idea that globalization might stimulate diversity.

<sup>11</sup> This is a concept that has become, unsurprisingly, a central concern of intellectual property scholarship: see, eg, C Waelde & H MacQueen (eds), *Intellectual Property: The Many Faces of the Public Domain* (Cheltenham, Edward Elgar, 2007).

<sup>12</sup> See further Macmillan, "The Cruel ©", n 7 *supra*; Macmillan, "Public Interest and the Public Domain in an Era of Corporate Dominance", n 7 *supra*; and F Macmillan, "Commodification and Cultural Ownership" in J Griffiths & U Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (Oxford: OUP, 2005) 35.

<sup>13</sup> See, eg, the discussion of the justifications for the free speech principle in E Barendt, *Freedom of Speech* (Oxford: Oxford University Press, 2<sup>nd</sup> ed, 2005).

example, take the subtle form of control exercised over the way we construct images of our society and ourselves.<sup>14</sup> But this subtle form of control is reinforced by the industry's overt and aggressive assertion of control over the use of material assumed by most people to be in the intellectual commons and, thus, in the public domain. The irony is that the reason people assume such material to be in the commons is that the copyright owners have force-fed it to us as receivers of the mass culture disseminated by the mass media. The more powerful the copyright owner the more dominant the cultural image, but the more likely that the copyright owner will seek to protect the cultural power of the image through copyright enforcement. The result is that not only are individuals not able to use, develop or reflect upon dominant cultural images, they are also unable to challenge them by subverting them.<sup>15</sup> Coombe describes this corporate control of the commons as monological and, accordingly, destroying the dialogical relationship between the individual and society.<sup>16</sup>

- These constrictions of the intellectual public domain affect its vibrancy and creative potential.

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<sup>14</sup> See further, eg, R Coombe, *The Cultural Life of Intellectual Properties*, (Durham/London: Duke University Press, 1998), 100-129, which demonstrates how even the creation of alternative identities on the basis of class, sexuality, gender and race is constrained & homogenised through the celebrity or star system.

<sup>15</sup> See, eg, *Walt Disney Prods v Air Pirates*, 581 F 2d 751 (9<sup>th</sup> Cir, 1978), *cert denied*, 439 US 1132 (1979). On this case, see J Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property" (1993) 69 *Chicago-Kent Law Review* 841; & Macmillan, "Public Interest & the Public Domain in an Era of Corporate Dominance", n 7 *supra*. See also M Chon, "Postmodern 'Progress': Reconsidering the Copyright and Patent Power" (1993) 43 *DePaul Law Review* 97; D M Koenig "Joe Camel and the First Amendment: The Dark Side of Copyrighted and Trademark-Protected Icons" (1994) 11 *Thomas M Cooley Law Review* 803; & F Macmillan, "Towards a Reconciliation of Copyright and Free Speech" in E Barendt (ed), *Yearbook of Media Law and Entertainment Law* (Oxford: Clarendon Press, 1996), 199.

<sup>16</sup> Coombe, n 14 *supra*, 86.

- They also tend to undermine the utilitarian/development justification for copyright, which is increasingly seen as the dominant justification for copyright protection, especially in jurisdictions reflecting the Anglo-American bias on these matters. As is well-known, the general idea underlying this justification is that the grant of copyright encourages investment in the production and dissemination of cultural works, which is essential to the development process.<sup>17</sup>
- However, the consequences of copyright's commodification of cultural goods and services, as described above, seem to place some strain on this alleged relationship between copyright and development. Particularly where development is thought of in UNESCO's terms as involving "access to the world's stock of knowledge, ... access to power, the right to participate in the cultural life of the community".
- None of these problems have been alleviated by the fact that the international copyright system has been embedded in the World Trade Organization as a result of its Agreement on Trade-Related Intellectual Property Rights (TRIPs Agreement).<sup>18</sup> In fact, there are good reasons for

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<sup>17</sup> For a good example of a statement of this rationale, see the Preface to World Intellectual Property Organization, *Guide to the Berne Convention for the Protection of Literary and Artistic Works*, (Geneva: WIPO, 1978). For discussion of this rationale, see, eg, J Waldron, "From Authors to Copiers: Individual Rights & Social Values in Intellectual Property" (1993) 69 *Chicago-Kent Law Review* 841, 850ff; & F Macmillan, "Legal Policy and the Limits of Literary Copyright" in P Parrinder, W Chernaik and W Gould (eds) *Textual Monopolies: Literary Copyright and the Public Domain* (London: Arts and Humanities Press, 1997), 113.

<sup>18</sup> TRIPs Agreement, Art 9.1, incorporates Berne Convention, Arts 1-21, except Article 6bis (moral rights) by reference. TRIPs Agreement, Arts 10-14 add some further obligations. In particular, Arts 11 and 14.4 broaden the exclusive rights of the copyright holder by the addition of rental rights in relation to computer programmes, films and phonograms. However, neither of these provisions are unique in international copyright law: see WIPO Copyright Treaty 1996, Art 7; and WIPO Performances and Phonograms Treaty 1996, Arts 9 & 13.

thinking that the TRIPs Agreement and the WTO agreements more generally have exacerbated these problems.<sup>19</sup>

- Suffice it to say at this point that in the context of a discussion of international instruments affecting the protection of cultural rights, the important thing about the WTO agreements, including the TRIPs Agreement, is not just that they have the capacity to adversely affect some cultural rights, but also that they famously contain no general “cultural exception”. This means that there is almost no space in the WTO system for a consideration of cultural interests or rights.<sup>20</sup> The question of the cultural exception in the WTO was, however, long debated<sup>21</sup> and it can hardly be a surprise that those countries who lost this debate strongly supported the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

### **Cultural rights and intellectual property rights?**

- This brings us back to the question of the relationship between cultural property and intellectual property. There has been a remarkable persistence in claims to connect cultural rights and intellectual property

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<sup>19</sup> For a fuller version of this argument see Macmillan, “Copyright, the World Trade Organization, and Cultural Self-Determination”, n 4 *supra*.

<sup>20</sup> For a fuller version of this argument, see Macmillan, “Copyright, the World Trade Organization and Cultural Self-Determination”, n 4 *supra*.

<sup>21</sup> For an account of the history of the debate in the WTO over the absence of a cultural exception, see M Hahn, “A Clash of Cultures? The UNESCO *Diversity Convention* and International Trade Law” (2006) 9 *Journal of International Economic Law* 515; & Graber, n 2 *supra*, 554-555.

rights. This is despite the fact that the system of intellectual property rights is in conflict with many of the rights that might be described as cultural rights.

- On the other hand, what is common to intellectual property and cultural property is that both make an appeal to the preservation or reservation of property rights in cultural artefacts in some form. In order to demonstrate this claim, I am using the concept of cultural property broadly to include both tangible and intangible cultural property.
- Legally speaking, claims to cultural property are generally claims by a state or by a community (somehow defined) to certain property rights. Where international law recognises these rights as belonging to community then it often identifies that community as global, or as humanity in general. Nevertheless, as is the nature of international law, these global rights and rights of humanity are to be enforced through the agency of states. The protection of world heritage sites under the World Heritage Convention is an example of this. In this case, the type of property right asserted is generally a right of preservation and sometimes a right of access.
- National laws often make similar claims to artefacts falling within the general rubric of “heritage”. In these cases a wide range of rights are asserted, from full state ownership, through rights of preservation exercised by the state, to rights vested in the state to control physical movement of artefacts. The last is often particularly important in state regimes relating to tangible cultural property. States may, for example,

attempt to prevent certain artefacts leaving their territories on the ground of their significance as “heritage”.<sup>22</sup>

- Obviously, some of these types of rights do not map onto intangible cultural property. Nevertheless, whether cultural property is tangible or intangible the essential features of cultural property are:
  - first, that it is “owned” publicly or, at least, in common;
  - secondly, that the ownership rights focus on preservation, access and the sharing of benefits associated with it; and
  - thirdly, that the role of cultural property rights are to prevent or limit the privatisation of cultural property.
- Claims to intellectual property are, of course, quite different since they focus on a private property right. Further, unlike cultural property, they are never claims to tangible property, but rather claims to intangible rights (albeit claims that often implicate tangible objects).<sup>23</sup>
- In general this means that although there maybe tangible objects that simultaneously attract claims for intellectual property rights and cultural property rights, in the tangible realm we are rarely in danger of confusing or eliding the two types of property claims.

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<sup>22</sup> One of the few species of cultural rights recognised by WTO law: see WTO General Agreement on Trade and Tariffs (GATT), Art XX(f), which provides an exception for measures “imposed for the protection of national treasures of artistic, historic or archaeological value”.

<sup>23</sup> In fact the relationship between intellectual property and tangible objects is often problematic. The most obvious example of this relates to the intellectual property protection of works of visual art: see F Macmillan, “Is Copyright Blind to the Visual?” (2008) 7 *Visual Communication* 1.

- Things are otherwise, however, in the realm of intellectual or intangible space. Here, the dangers of confusing, eliding and overlapping cultural rights and intellectual property rights are considerable.
- In the imaginations of intellectual property scholars, intellectual or intangible space tends to consist of two parts, the public domain and the private domain.
- Much has been made of the intellectual public domain. It has been reified, and then valorized, as the place where community and culture are protected from “property”, meaning privately owned property, and where creativity consequently flourishes. Thus the relationship between the intellectual public domain and the intellectual private domain looks something like the relationship between raw materials and manufactured products.
- Since, at least theoretically, cultural property is publicly owned, it would seem to fall within the intellectual public domain.
- It is at this point that we start to run up against the limitations of some of the metaphors that are commonly used to contrast the private and public intellectual domains. If we were to apply these metaphors it would suggest that the division between cultural property (in the public domain) and intellectual property (in the private domain) in the intangible domain resembles in some way the divisions between knowledge and innovation, idea and expression, and (most perplexingly) nature and culture.

- In any case, whatever the limitations of the metaphors, the main role of cultural property rights in the intellectual domain must surely be to protect the public domain from the encroachments of the private domain, not to mimic those encroachments.

This would all sound beautifully convincing were it not for two issues:

- The first is the claim to some sort of hybrid space in the intellectual domain in which cultural property, owned on a communal basis, is protected through a property device that mimics, or is, private intellectual property. This is, of course, the basis for the claim of the protection of traditional cultural expressions and knowledge through intellectual property-like devices. These claims, being claims by a community forming less than the public as a whole, to cultural property in the form of intellectual property, strike right at the heart of the hidden or obscured relationship between intellectual property and cultural property. They are founded on the assertion that this cultural property can only be preserved through its transformation into private property.
- An examination of these claims casts some light on the second outstanding issue, which is the more general question of the appropriate role of cultural property rights in preserving and maintaining cultural property in the intangible realm.

### **Returning to the question of copyright and arts festivals**

- So how does all this relate to the question of copyright and arts festivals?



- At some very general level much of the rhetoric associated with arts festivals seems reminiscent of the rhetorical tropes of copyright law (creativity, creative arts, development) and indeed, looking more broadly at copyright in the context of intellectual property as a whole the history of intellectual property law is closely tied to the idea of a festival since one of the generative moments of the Paris Convention was the Great Exhibition of 1851 and those that followed in its wake.
- The Great Exhibitions were also a pivotal moment in the historical development of notions of national and international cultural heritage. And, returning to the general level, an association exists between the rhetorical tropes of cultural rights and cultural heritage rights (human creativity, common heritage of humankind, cultural diversity) and those relating to present day arts festivals.
- Of course, one of the challenges when one tries to descend from the general to the specific is that exactly how one fits arts festivals into this picture depends very much on the type of arts festival in question.
- This is why, for the purposes of this project, it is necessary to elaborate a taxonomy of festivals. At this stage, and before being informed by the conduct of case studies, it seems to me that the following factors should be taken into account:
  - Whether the festival is privately or publicly funded;
  - Whether the festival is aimed at a “professional” audience or at the general public;
  - Whether the primary purpose of the festival is the marketing of discrete cultural products (for example, books, films, music) or is the generation or development of creative interactions;
  - Whether it is connected with a particular country or region and whether the connection is a necessary/fundamental or incidental/instrumental one. (A necessary connection might, for example, be something like *Festival dei Misteri*, in the Veneto, which

is a festival of, in the words of its Director, “gli spettacoli dedicati ai misteri e alle leggende del Veneto nelle piazze, nei borghi, nelle città d'arte o immersi nella splendida natura della regione, dai boschi montani alle acque della laguna”. A more instrumental one might be represented by the report in *Il Venerdì di Repubblica*, 27 novembre 2009, that “Como, ridotta all’ultimo cinema, vuole un festival” in the hope of increasing its number of cinemas.)

- For the purposes of this presentation, however, I want to take the example of the (probably) publicly funded festival the aim of which is the generation or development of creative synergistic reactions; in other words, the festival as a creative, performative moment or series of moments.
- Thinking of a festival in these terms it seems to me that the problems raised in terms of the intellectual property/cultural property interface have some parallels with those relating to the issue of indigenous cultural property.
- First, there are considerable technical difficulties in stretching or re-shaping copyright law to protect the sort of creativity that occurs at festivals. These include:
  - the closed categories of protected copyright works and the consequent inability of the copyright system to protect new forms of creative works, especially “hybrid” works;
  - the evolution of copyright as a right in relation to text-based works, which may have adversely affected its ability to regulate non text-based forms of cultural production;
  - the failure of the copyright system to recognise so-called ephemeral works;

- a relatively inflexible concept of authorship, in particular a concept that (we know from the indigenous context) does not easily embrace notions of group authorship;
  - limited and uncertain legal spaces for using or appropriating material from other copyright protected works;
  - the emphasis of the copyright system on the rights of disseminators of cultural works at the arguable expense of the creators of those works.
- Secondly, the types of creativity that might occur in the context of an arts festival of the sort I am describing possibly require a kind of defensive use of intellectual property rights in the sense that the festival as a performative moment requires a certain degree of liberty and freedom inside a certain group (ie freedom without the constraints of intellectual property), but at the same time this creative freedom will only be freely expressed if there is some protection from unlawful appropriation of creativity from outside the group.
  - Thirdly, I wonder whether it is appropriate to allow copyright to constitute what is intended to be an innovative moment of creativity. In relation to indigenous cultural property, one of the most important criticisms that can be made of the idea that it should be protected by intellectual property rights is that it has to be corralled into the shape of Western intellectual property law.<sup>24</sup> If the item of cultural property is a story, music, or artwork then it has to be fitted into copyright law; designs and symbols must fit into the netherworld of the relationship between copyright, designs and trade marks; knowledge about local flora and fauna must be fitted somewhere into patent law, plants breeder's rights, geographical indications. This will mean that different levels of protection will apply to different types of traditional knowledge and culture. In short, the end result is that occidental intellectual property law comes to constitute traditional, or non-

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<sup>24</sup> See M Blakeney, "The Protection of Traditional Knowledge Under Intellectual Property Law" (2000) 22 *European Intellectual Property Law Review* 251.

Western, culture and heritage.<sup>25</sup> In so doing, it changes the shape of that heritage in ways that are not necessarily the consequence of the reflexive cultural practice that in fact constitutes so-called traditional cultural expressions and knowledge. Although lacking the post-colonial context, I wonder whether stale old copyright law, and perhaps also designs law, are up to the task of constituting inherently innovative cultural practices.

### **Some Tentative Questions and Even More Tentative Answers**

- Can we think of, at least some types, of festivals as a species of cultural space and the synergistic exchanges within that space as a type of cultural property?
- Do we leave cultural property in the intellectual public domain where it can be freely mined as raw material for intellectual property, but where it might not be adequately conserved or preserved as cultural property?
- Or, do we privatise it through intellectual property rights and run the risk of destroying its distinctive character as cultural property and heritage?
- These questions are, of course, part of a much larger problem about the preservation and conservation of intangible cultural property in the intellectual domain.
- It almost goes without saying that, in intellectual space, the problem of the relationship between cultural property and intellectual property is unresolved by law. Consequently, the question of preserving or conserving cultural property in intellectual space remains inadequately addressed.

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<sup>25</sup> P Fitzpatrick and R Joyce, "Copying Right: Cultural Property and the Limits of (Occidental) Law" in F Macmillan (ed), *New Directions in Copyright Law: Volume 4* (Cheltenham: Edward Elgar, 2007) 171.

- The suggestion that the best method of preservation and conservation of intangible cultural property is by its privatisation in the form of intellectual property does, however, seem naive. Not only is intellectual property ill-equipped to protect cultural rights, it is clearly implicated in the constriction and possible destruction of some cultural rights.
- We need to solve this problem by a much more complex articulation of the intellectual or intangible domain. Specifically, I think we need to start moving away from the simplified binary divide of the intellectual public domain and the intellectual private domain of intellectual property law. Or, at least, away from the notion that the intellectual public domain is some undifferentiated concept equating to the “commons” in Roman law.<sup>26</sup> Let us start, instead, to give some much more complex legal architecture to the public domain of intellectual space. A blueprint for a such architecture might include:
  - a notion of the difference between what is publicly owned in intellectual space and what is in the commons – that is, unowned –in intellectual space and thus ripe for appropriation;
  - an associated recognition that some things can never be owned, at least privately, because of their cultural significance;
  - development of the concept of group and communal rights, belonging to less than the public as a whole, bounded by property on

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<sup>26</sup> See further C M Rose, “Romans, Roads and Romantic Creators: Traditions of Public Property in the Information Age” (2003) 66 *Law & Contemporary Problems* 89.

the outside, but inside promoting freedom and space for creativity, innovation, invention, and cultural conservation.<sup>27</sup>

Failure to develop the same complex architecture in intellectual or intangible space as that which we have developed in tangible space for the preservation of heritage and cultural property, only invites constant encroachment by the type of private propertization in intellectual space that undermines and destroys claims to cultural property in that space. The power of intellectual property rights in the context of the ascendant system of WTO law makes this an urgent political and legal project.

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<sup>27</sup> On each of these points, see further F Macmillan, "Altering the Contours of the Public Domain" in MacQueen and Waelde (eds), n 11 *supra*, 98.